SUPREME COURT, U.S.
DEC 26 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1002

JOHN CARLYLE RICHARD,
Respondent,

versus

DRESSER OFFSHORE SERVICES, INC.,
Petitioner.

JOHN CARLYLE RICHARD,
Respondent,

versus

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

JOHN CARLYLE RICHARD,
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versus

DRESSER OFFSHORE SERVICES, INC.,
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JOHN CARLYLE RICHARD,
Respondent,

versus

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dresser Offshore Services, Inc., and Insurance Company of North America, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

There is no written opinion on the merits by the District Court in and for the Western District of Louisiana in *John C. Richard vs. Dresser Offshore Services, Inc.* and *Insurance Company of North America* Civil Action #16568; the opinion of the United States Court of Appeals for the Fifth Circuit in this case (Appendix "A", *infra*, p. 1a) is reported as an "Affirmance Without Published Opinion" at 481 F.2d 1402.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *John Carlyle Richard vs. Dresser Offshore Services, Inc.* and *Insurance Company of North America* (No. 73-2271) was entered on September 7, 1973. (Appendix A *infra* p. 1a) A rehearing in this case was denied by the Fifth Circuit Court of Appeals on October 4, 1973. (Appendix B *infra* p. 2a) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit has denied respondents due process of law by disposing of the issues involved in this case under that court's rules 18 and 21.

2. Whether grave and prejudicial errors were made by the trial judge in the instructions to the jury with reference to elements of comparative negligence, future loss of earnings and items of general damages.

3. Whether the Court of Appeals for the Fifth Circuit erred in failing to enter a remittitur to reduce the District Court's judgment of $125,000.00 for the removal of a coccyx where the medical testimony was uncontroverted that the plaintiff was disabled for nine months and was able thereafter to return to work without any disability.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "... Nor be deprived of life, liberty, or property, without due process of law; . . ."

Rule 18 of the Rules of the United States Court of Appeals, Fifth Circuit, provides as follows:

> "Rule 18 Summary Calendar
>
> (a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.
>
> (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. vs. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

As amended July 1, 1971."

Rule 21 of the Rules of the United States Court of Appeals, Fifth Circuit, provides as follows:

"Rule 21 Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See N.L.R.B. vs. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Added July 1, 1970."

STATEMENT

Respondent, John C. Richard, filed suit against Dresser Offshore Services, Inc. and Insurance Company of North America under the Jones Act and under the General Maritime Laws, including concepts of Breach of Warranty of Seaworthiness and Maintenance and Cure, as a result of an accident which occurred on July 15, 1970 when the plaintiff fell off a ladder approximately 10 feet onto the top of a shed, sustaining some injuries. Petitioners filed a general denial with an alternative allegation of comparative negligence.

The trial began on December 14, 1972, which was a Friday, there was an intervening weekend, and it was concluded on December 17, 1972.

On December 17, 1972, the matter was argued to the jury, the Judge instructed the jury with reference to the legal principles involved, the petitioners objected to some of the charges given by the court, the failure to give some of the requested charges given by the respondent and the matter was then submitted to the jury on special interrogatories. During the deliberations, the jury asked for, in addition to other matters, the discount table referred to by the court with reference to future loss of earnings and the statement by

the court with reference to work-life and life expectancy. The jury, answering special interrogatories, found negligence, unseaworthiness, comparative negligence on the part of the plaintiff to the extent of 10%, and damages in the amount of $125,000.00. The petitioner's thereafter timely filed a motion for judgment notwithstanding the verdict and alternatively for new trial and/or remittitur. Subsequently, a supplemental alternative motion for new trial was filed which motions were denied and petitioners perfected an appeal to the United States Court of Appeals for the Fifth Circuit. (*John Carlyle Richard vs. Dresser Offshore Services, Inc. and Insurance Company of North America*, No. 73-2271.)

After complying with all procedural requirements for lodging the appeal with the United States Court of Appeals for the Fifth Circuit, the petitioners were notified on August 30, 1973 that the Fifth Circuit Court of Appeals pursuant to local Rule 18 had transferred the case to the summary calendar for disposition. As a result of being placed on the summary calendar, respondents were denied the right to orally argue their case and on September 7, 1973, the Fifth Circuit Court of Appeals rendered a per curiam opinion "AFFIRMED. See Local Rule 21." Thereupon, the petitioners petitioned for rehearing which was denied on October 4, 1973.

REASONS FOR GRANTING THE WRIT

I. Petitioners Have Been Denied Due Process Of Law In The Disposition Of The Issues Involved In This Case Because Of The Action Of The United States Court Of Appeals, Fifth Circuit, Taken Pursuant To Its Rules Numbered 18 And 21.

The Fifth Amendment of the Federal Constitution prohibits the depriving of any person, natural or artificial, of property without affording "Due Process." Part of the due process requirement is the concept of a "hearing" in all judicial determinations, and the concept of "hearing" is set forth in Section 46 of Title 28 U.S.C.A. which provides in subsection C that:

> "Cases in Controversy *shall be heard* and determined by a court or division of not more than three judges unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in the regular act of service." (Emphasis Added.)

The United States Supreme Court in the case of *United States vs. Hayman*, 342 U.S. 205, 2 S. Ct. 263 (1952), in defining the word "hearing" as used in Section 2255 of Title 28 of the United States Code Annotated, stated:

> "In requiring a 'hearing' the section 'has obvious reference to the tradition of judicial proceedings'. Respondent denied an opportunity to be heard, 'has lost something indispensible, however convincing the ex-parte showing'."

The concept of a "hearing" is well delineated in the United States Supreme Court Rules. Rule 44 provides for oral argument and goes into this extensively. Even in cases on the summary calendar, each side has one half hour for oral argument. (Paragraph 3 of Rule 44.) The right to oral argument, and its importance in the advocacy of a case, is stated in Rule 45 of the United States Supreme Court, which states:

> "The Court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

Oral argument is an indispensible part of a "hearing" for it is by both the written and the spoken words that effective communication of the issues to the court is insured. Oral argument is especially necessary at the appellate level where the validity of the witnesses' testimony is lost in the inert record and it is only through the advocate that the vitality is restored.

The Appellate Judges have in the past, relied on their law clerks for the primary study of the record and the specific points of law. The writer was a legal clerk for the Orleans District Court Judges and remembers the extent to which some of the Judges relied on the clerk's basic research. Oral argument presents the safeguard against human error in this type of situation.

And last, but not least, it is through the personal confrontation of persons — between the lawyer and the Judge and between the Judges in the panel in their own deliberations — that a judge is able to determine where the weaknesses and strengths are to be found in the advocate's case. Certainly more cases can be decided if no time is devoted to oral argument and no time is taken for face-to-face discussion among the deciding judges, but this should not be done at the expense of the litigants.

The writer recognizes that expediency in the handling of the increasing number of appeals has constrained the court to adopt the "summary rule," but in doing so and disposing of cases in a summary manner without permitting oral argument, due process is effectively denied to the litigant. Mr. Cicero Sessions and Mr. Samuel Gainsburgh of New Orleans along with other notable trial lawyers submitted statements at the hearing by the Commission on Revision of the Federal Court Appellate System in New Orleans, Louisiana, on August 22, 1973 which point out that the adjudication of cases on appeal under their summary procedure violates the requirements of the due process clause of the Constitution. (See Appendix D and E.)

It is respectfully submitted that the summary disposition of this case under the Rules of the Fifth Circuit Court of Appeals, deprived defendants of due process as required by the Constitution of the United States, and therefore, a Writ of Certiorari should be granted herein, directed to the Fifth Circuit Court of Appeal.

II. Grave And Prejudicial Errors Were Made By The Trial Judge In The Instructions With Reference To Elements Of Comparative Negligence, Future Loss Of Earnings And Items Of General Damages.

A. The Court Erred In Failing To Grant Petitioner Instructions With Reference To Comparative Negligence.

The Court instructed the jury with reference to the issue of comparative or contributory negligence as shown in the transcript beginning on Page 278 and ending in the middle of Page 279. Nowhere does the Trial Judge define what contributory negligence is, or what the duty on the part of the respondent was to exercise care for his own protection.

The petitioner submitted the following instruction to the Court:

> "Plaintiff was obliged to make reasonable use of his faculties and senses to observe and avoid danger, and he must be presumed to know what the ordinary use of his faculties would make apparent to him. His failure to observe or avoid any such danger that is observable and avoidable constitutes contributory negligence on his part. *Honoy vs. Harding,* 300 F.Supp. 696 and 699; *Ellington vs. American Mail Line, Ltd., et al.,* 163 F.2d 133; *Naigle vs. Isprantesen Company, Inc.,* 177 F.2d 163 (2nd Cir. 1949.)"

This petitioners' charge was Number 12 and the failure to give it by the Trial Court was objected to as shown on Page 288 of the transcript.

This particular Charge Number 12 was important to have been given in this particular case because of the respondent's gross negligence in using only one hand to climb the ladder and thereafter upon reaching the area of the main beam where he was required to walk across to get on to the third ladder, he not only failed to use the ladder extension which existed above the beam, but blindly and without using his senses whatsoever, reached out erroneously assuming that the beam was an I-beam, found no support and fell.

It is submitted to this Court that *had* the Trial Judge defined the concept of contributory negligence or comparative negligence and used petitioners' Charge Number 12, the percentage of comparative negligence on the part of the plaintiff would have been much greater. Accordingly, the Trial Court's refusal to grant this charge was prejudicial to the petitioners, thereby entitling them to a new trial.

B. The Court Erred In Charging The Jury With Reference To Future Loss Of Earnings And Future Impairment Of Earning Capacity On The Basis That There Was No Evidence On Which To Base These Instructions.

In the present case the Trial Judge instructed the jury with reference to impairment of earning capacity and future loss of wages as reflected on Pages 282

and 283 of the transcript. As shown on Page 290 of the transcript, petitioners objected to the charges with reference to impairment of earning capacity and future loss of wages on the basis that there was no evidence in the record to substantiate those items of damages.

The jurisprudential law is to the effect that for there to be recovery for future loss of wages, future impairment and pain and suffering, there must be medical testimony to substantiate the respondent's contentions. In *American Fire and Casualty Company vs. Jackson,* 187 F.2d 379 (1951), the Court held that where the medical testimony was to the effect that the probabilities were that the plaintiff had recovered from her injuries and would suffer no future pain and suffering, the mere testimony of the plaintiff was not sufficient to establish future loss of wages and pain and suffering and held the verdict to be excessive.

Again in *Abernathy vs. Southern Pacific Company,* 426 F.2d 512 (1970), the Fifth Circuit Court of Appeals held that the testimony of the plaintiff and her son with reference to future medical expenses, loss of earnings, pain and suffering of the son in the absence of medical testimony was insufficient "as a matter of law" to recover for those items of damages. Again the verdict in that case was held to be excessive and the District Court instructed to enter a remittitur. See also *Rheaume vs. Patterson,* 289 F.2d 611 (2nd Cir. 1961) and *Keaton vs. McCook,* 210 F.Supp. 226 (W.D. Ark. 1962).

There are cases from other jurisdictions which support the same principle of law. In *Diemel vs. Weirich,* 58 Northwestern 2nd 651 (Wis. 1953), the Court after stating the principle of law that where an injury is subjective in character and of such a nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts require the introduction of competent expert opinion testimony to that effect before allowing recovery, stated as follows on Page 652:

> "We believe that sound public policy requires adherence to such rule. It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long in their opinion they think such pain will continue in the future, and fix damages therefore accordingly. Only a medical expert is qualified to express an opinion to medical certainty, or based on medical probabilities (not mere possibilities), as to whether the pain will continue in the future, and, if so, for how long a period it will so continue. In the absence of such expert testimony (which was the situation in the instant case) the jury should be instructed that no damages may be allowed for future pain and suffering.

> "We, therefore, conclude that it was prejudicial error not to have given the requested instruction, and instead to have instructed the jury that they might take into consideration future pain and suffering in fixing the plaintiff, Ida Diemel's damages."

In *Jones vs. Berry*, 45 Southeastern 2nd 1 (W.Va. 1947), the Court there assigned as prejudicial error the Court's instructions as to future pain and suffering where there was no medical expert testimony to substantiate any such claim.

In *Brush vs. Eastern Motor Dispatch, Inc.*, 104 Northeastern 2nd 700 (Ohio 1950), the plaintiff claims to have suffered from headaches and from knee injury but no medical testimony was introduced with reference to future pain and suffering. The Court of Appeals of Ohio held that instructions along the lines allowing for future pain and suffering was prejudicial error.

Bachran vs. Morishige, 469 Pacific 2nd 808, the Court there held that in the absence of medical testimony that there was reasonable probability that the plaintiff would experience pain and suffering and would be disabled in the future, the Trial Court erred in charging the jury on the question of future pain and suffering.

In *Herndon vs. Crawford*, 119 Northwestern 2nd 82 (Neb. 1963), the Supreme Court there also held that an instruction with reference to future pain and suffering without expert testimony to back it up was prejudicial error.

In *Klein vs. Hodgman & Sons, Inc.*, 85 Northwestern 2nd 289 (S.Ct. of S.D. 1957), the Court there held in a back injury case that where the plaintiff who was still complaining of pain and disability at the time of trial failed to introduce medical evidence to establish future pain and suffering, the instruction including the items of damages of future pain and suffering was prejudicial error.

Again in *Prather vs. Phillis Wheatley Association*, 193 Northeastern 2nd 290 (Court of Appeals of Ohio 1963), the Court held that instructions along the lines of future pain and suffering and disability in the absence of medical testimony to that effect, was prejudicial error.

In the present case, there was no medical testimony whatsoever to substantiate any allegations of future pain and suffering, loss of earning capacity, future loss of wages and, accordingly, that the Trial Court erred in giving these instructions to the jury. There is no question that these instructions were prejudicial since the jury awarded to the respondent ONE-HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS for removal of the coccyx, possible two fractured ribs and a laceration of the leg. The gross excessiveness of the award will hereinafter be discussed. It is therefore submitted to this Court that the Trial Judge, in giving instructions with reference to future loss of earnings and future loss of earning capacity, erred, that the error was prejudicial and, accordingly, petitioners are entitled to a new trial.

C. The Court Erred In Failing To Give Petitioners' Instructions With Reference To The Award Not Subject To Federal And State Taxes.

Petitioners are objecting to the Court's failure to give instructions that the award is not subject to federal and state taxes. There is a conflict in the Federal Court of Appeals Circuits:

The *Fifth Circuit* has held that the Trial Court is *not* to charge the jury that the award is not subject to income taxes. *Cunningham vs. Bay Drilling Company*, 421 F.2d 1398 (1970).

The *Third Circuit* has held that the Trial Court is to charge the jury that the award is not subject to income taxes. *Domeracki vs. Humble Oil & Refining Co.*, 443 F.2d 1245 (1971.)

The *Second Circuit* has held that the Trial Court is to charge the jury that the award is not subject to income taxes. *McWeeney vs. New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (1960).

It is submitted to the Court that since the decisions of the Second and Third Circuits are in accord with income tax law, their pronouncement of the law is correct and the Trial Judge was in error in this instance.

D. The Court Erred In Instructing The Jury With Reference To The Items Of Damages Which Are Recoverable In A Personal Injury Case In That There Was Duplication Of Alleged Recoverable Items And

The Instructions Were Couched In Terms Which Could Have Confused The Jury As To The Correct Standards It Had A Duty To Apply In This Regard.

In the recent case of *Dugas vs. The Kansas City Southern Railway Lines*, Number 72-2338 (February 2, 1973), the Fifth Circuit in a per curiam decision, held that there was error in the instructions given by the Trial Court in that the separate and independent items of damages mentioned by the Judge were duplications and some of these items were included in the items of damages that the Judge had already mentioned. On Page 11 the Court stated as follows:

> "The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience *including* (emphasis added) the effect of his injuries upon the normal pursuits and pleasures of life."
>
> "We think the foregoing language is significant; the effect of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages."
>
> "While we have found no federal case, and we have been cited none, on the subject of 'loss of vitality' we are equally certain that this item is an included element of the consequences of

> physical injury, not separately to be measured independently of the basic premise."

Using these standards by which to gauge the correctness of the District Court's instructions in this case, the instructions found on Pages 281 and 282 of the transcript used in this case by the Trial Judge are in error:

> "You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence in the case, and no other. 1) Physical and mental pain and suffering; 2) shame and embarrassment, mental anguish and anxiety, worry and concern, including feelings of economic insecurity caused by disability; income lost in the past — that is, from the time of the injury to the date of trial; impairment of earning capacity or earning ability in the future; the impairment of normal progress in plaintiff's earning capacity; and the impairment of his normal ability to enjoy the pleasures and pursuits of life."

These instructions contain duplications in the enumeration of the items of damages that can be recoverable and duplications which were prejudicial to the petitioner in this case in the following particulars. The three basic items of recovery are physical pain and suffering, mental pain and suffering and the impairment of normal ability to enjoy the pleasures and pursuits of life. These three items were set forth by the Trial Judge; but in addition, the Judge stated that the respondent could recover for "shame and embarrass-

ment, mental anguish and anxiety, worry and concern, including feelings of economic insecurity caused by disability: all of which items should be included as part of the mental suffering and accordingly submit that there was error in this aspect of the charge.

The Court then instructed the jury that they should take into account "impairment of earning capacity or earning ability in the future" and also the "impairment of normal progress in plaintiff's earning capacity" which items the writer submits to the Court are duplications in and of themselves and also are items which should have been included as part of the loss of wage factor.

Accordingly, these instructions with reference to items of damages recoverable contain prejudicial duplications which constituted an error that unquestionably had a prejudicial effect on the amount of the verdict which was completely out of line with the evidence in the case.

III. The Court Erred In Failing To Grant A New Trial And/Or Remittitur Since The Amount Of Damages Awarded By The Jury Is Grossly Excessive Under The Circumstances And Evidence Presented.

The medical testimony in this case presented by the respondent and petitioner establishes that the claimant sustained a nondisplaced fracture of the fourth sacrum, a fracture of the fifth sacrum which ultimately required its removal, a low back strain, possible fractures of some ribs which were never identified and a sprain of the costochondral joint. As of May of 1971 when Dr. Meuleman saw him the second time, approxi-

mately ten months after the accident, the plaintiff had recovered from his injuries without any residual disability and was able to return to work as a roughneck. (Tr. 124.) This was corroborated by subsequent medical examinations. There was no medical evidence to the contrary.

Under these circumstances, it is submitted to the Court that the maximum award that a jury could give under these circumstances would be TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS in general damages, approximately SIX THOUSAND FIVE HUNDRED AND NO/100 ($6,500.00) DOLLARS in loss of wages and, of course, all the medical expenses have been paid.

The amount of the verdict is unconscionable. The amount of this verdict and other shock judgments like this one are direct factors in this spiraling inflationary economy. The Courts have a non-delegable duty to reduce unconscionable verdicts for the benefit of the public at large; the ultimate payor is not the insurance company but the public who will pay for it by premiums or by the cost of goods and services. Accordingly, petitioner seeks this Court's intervention to remedy this wrong.

CONCLUSION

The case at bar presents the award by a jury of an unconscionable amount, ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS, for an excised coccyx, which award is attributable primarily to error in the Trial Judge's charges on damages. On Appeal, petitioners have been denied

a hearing and the case has been summarily disposed of by a singular word "affirmance." More and more the writer and other lawyers have seen the inroads at the trial and appellate levels of the concepts of justice and fairness for the quick disposition of cases sometimes irrespective of the outcome, in order to clear the crowded docket. The answer to the crowded docket is not the lessening of justice.

Petitioners submit that:

(A) The case be remanded to the Fifth Circuit Court of Appeals for "a hearing" which concept includes oral argument and personal confrontation of the lawyers and the judges and among the judges themselves;

(B) Pronouncement by this Court that the Trial Court erred in the jury charges given in the specifics set forth above and remand the case to the Fifth Circuit for a determination consistent therewith.

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVIDSON, MEAUX, ONEBANE, DONOHOE, BERNARD, TORIAN & DIAZ

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PROOF OF SERVICE

I, JAMES E. DIAZ, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari on Mr. Fredric G. Hayes, Post Office Box 3285, Lafayette, Louisiana 70501, attorney for respondent, by depositing a copy thereof in the United States Mails, properly addressed to the said attorney, postage prepaid.

Lafayette, Louisiana, November ____, 1973.

JAMES E. DIAZ

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2271
Summary Calendar*

JOHN CARLYLE RICHARD,
Plaintiff-Appellee,
versus

DRESSER OFFSHORE SERVICES, INC., and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

(September 7, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2271
Summary Calendar*

JOHN CARLYLE RICHARD,
Plaintiff-Appellee,

versus

DRESSER OFFSHORE SERVICES, INC., and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(October 4, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409.

APPENDIX C

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

STATEMENT OF CICERO C. SESSIONS AT HEARING BY THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM IN NEW ORLEANS, LOUISIANA, ON AUGUST 22, 1973

I reside in New Orleans, Louisiana. I have been practicing law in this City and State continuously since 1932 except for 54 months during World War II when I was an Army Judge Advocate. I am a partner in the law firm of Sessions, Fishman, Rosenson, Snellings & Boisfontaine. For a number of years the focus of my practice has been to civil trial advocacy and appeals with emphasis on Federal court litigation. In addition to all Louisiana state courts I am admitted to practice in the United States Supreme Court, the Fifth Circuit and Second Circuit Courts of Appeals, the Court of Military Appeals, the United States District Courts for the Eastern, Western and Middle Districts of Louisiana and have appeared as a qualified visiting attorney in many other Federal and State courts outside of Louisiana.

I belong to the American, Louisiana State and New Orleans Bar Associations, the Association of the Bar of the City of New York, The Maritime Law Association, the American Judicature Society, the American Society of International Law, International Association of Insurance Counsel, the Federation of Insurance Counsel and numerous other legal professional organizations, in addition to which I am a Fellow of the A-

merican College of Trial Lawyers and a Fellow of the International Society of Barristers.

I make this statement individually and not as a representative or in behalf of any of the foregoing organizations. In discussing with your Executive Director my personal appearance and statement before you I attempted to make it clear that this statement could not be complete nor as comprehensive as I would and should like it to be because of the extreme shortness of time available to me for research and preparation. Therefore, I shall have to be brief but hopefully meaningful in what I am prepared to say today.

I discussed with Mr. Orison S. Marden his statement to you in Washington on August 3, 1973, before it was given and have studied it more carefully since then. I shall endeavor to avoid categoric repetition of Mr. Marden's postulations because I agree with them entirely and hereby endorse them fully. The same subjects, however, are tangentially involved, at the very least, with some considerations I feel it needful to advance.

I was invited to participate in a seminar on "Lawyer-Court Relations" during the Fifth Circuit's Annual Judicial Conference last April in El Paso, Texas. That subject covered appellate procedures in this Circuit which I presume to be within your Congressional mandate. At any event, some Fifth Circuit Procedures are so proximate to and intertwined with consideration of reorganization or re-alignment of the Fifth Circuit as to be indistinguishable. This omelet can't be un-

scrambled — to discuss one point requires consideration of the other and vice versa.

In preparing for the seminar I wrote on a confidential basis to a large number of trial lawyers in states of the Fifth Circuit other than Texas (which my lawyer co-seminarian Frank Harmon of Houston handled). I received a very extensive response from a number of lawyers. In most pertinent respects those responses were practically unanimous. I collated and cumulated those responses and essentially as the surrogate, as it were, of those responding attorneys expressed their consolidated opinions and criticisms during the seminar. There were no prepared speeches of the seminar, no transcription has been written but it was taped. I outlined the subjects in which my lawyer informants were interested as a foundation or predicate for my own personal participation which was not limited, however, to that outline. It is indicative, however, of the points of importance in the trial bar's thinking most of which are germane to this Commission's jurisdiction. For that reason I give that outline as follows:

"1. Assigning oral arguments in cities geographically remote from areas where the case was tried and/or where counsel are located is excessively expensive.

(a) Should the Court go on circuit or should the bar go on circuit?

(b) Why can't appeals be docketed for oral argument in cities in which the Court now sits limited to appeals from that general area?

(c) With its increased expense to the litigants, how is the present system justified?

2. What is the justification for the summary disposition of appeals without allowing oral argument?

(a) Shouldn't there be a modification to allow at least limited oral argument on applications for rehearing after summary disposition?

(b) Aren't the criteria for summary disposition too broad?

(c) Shouldn't there be an opportunity by replication, brief or otherwise, however labelled, for counsel to be allowed some measure of opposition to a proposed summary disposition of an appeal before its summary disposition?

(d) Isn't deprivation of oral argument a denial of due process?

(3) Printing of the Appendix to Briefs is an exorbitant and expensive cost in many cases.

(a) Why can't appeals be considered on the original record, as in practically all state court systems, without the heavy expense of printing the supposedly pertinent parts of the record in the Appendix to Briefs?

(b) Is such printing expense designed as an economic deterrant to appeals? If so, is that fair and

justified? If not, then what useful purpose is served better than the state courts have and why?

4. Many lawyers feel that they are penalized time-wise by no additional argument time being allowed to compensate for time consumed by questions from the bench."

Many other specific matters were discussed at the seminar. My following comments track and to some extent expand upon relevant comments made during the seminar. I claim that though made in my own way and words, in substance they evidence the thinking of the majority of the lawyers upon whose written and oral in-put I relied.

The summary docket procedures of the Fifth Circuit go too far and prejudice due process in such extensive modification or denial of oral argument. Mammoth assemblies of statistics have been made available to me which I have only had time to examine cursorily, which doubtless are in the hands of the Commission and to which I shall refer very sparsely.

I learn that today 47% of the Fifth Circuit docket consists of criminal appeals and that the majority of summary dismissals are of criminal appeals which, in the main, are frivolous, and are, from case to case, indistinguishable from one another in invalid issue involved and incisive frivolity. I pose the rhetorical question — doesn't this have to be the experience of the other circuits also? I believe it must, and thus is foundationed the next questions, which, are not rhetorical.

Has not the Congress gone too far in broadening criminal appellate jurisdiction? Isn't it overwhelmingly evident by now that it is not constitutionally necessary nor really socially necessary for there to be such gross liberality of appellate jurisdiction to the extent of jeopardizing the survival of the whole federal judicial system? To my thinking these questions answer themselves loudly in the affirmative. It is no answer to say create more judgeships and build more courthouses. That is a politically pragmatic approach which can only result in as much of a Draconian result as achieved by the Fifth Circuit's summary procedures.

It is also to be learned from the statistics that oral argument is allowed in 60% of the Fifth Circuit's civil appeals. I am unconcerned how the Fifth Circuit Local Rule 21 is explained, evaluated, parsed or justified. It boils down in any event to the proposition that 40% of its civil appeals shouldn't have been taken because they are either frivolous or unworthy of full appellate consideration and are to receive summary disposal. I simply am not persuaded the Rule 21 procedures can possibly be legitimated for the astoundingly large total of 40% of the Court's civil docket. Certainly the attorneys whose appeals have been lost without the benefit of their speeches to the Court will join me in surmising in this context a serious possibility of denial of due process in some of the civil cases comprising the 40% denied oral argument.

I have not talked to or heard, orally or in writing, from one single Fifth Circuit lawyer who does otherwise than be critical of the modification of oral argu-

ment. To put it another way, I know of no lawyer approval of the summary disposition process in its present entirety. This trend has spread to the District Courts and is being recognized and taken as another Federal judiciary step toward destruction of the adversary system of administering justice. Some District Judges in the Fifth Circuit are now denying oral argument on dispositive initial motions to dismiss or for summary judgment as a matter of course and presumably with the Fifth Circuit's summary procedures as a practical precedent. This to me is judicially presumptuous and dictatorial and only a supine bar being abdicative of its full professional obligations will put up with it. This is beyond your direct jurisdiction but philosophically and practically is a progressive result of current appellate procedures denying historically granted and perhaps constitutionally required due process procedures which are within your Congressional mandate.

Chief Judge Brown, at page 45 of his statement to the Burdick Committee, says as to summary dismissals without oral argument:

> "That Summary II's run the gamut of the Court's whole docket and do not in any sense — as too often supposed by some Judges, scholars and critics who are uninformed — represent so-called 'trash' or frivolous, worthless, wasteful cases is shown by the following subject matter breakdown for FY 1971." (Statistics omitted.)

The fact that oral argument is denied across the whole spectrum of the Court's docket in such a large per-

centage of cases as the Court's statistics show suggests that the expediencies of keeping up with the constantly increasing volume of the Court's business has been at the expense of one of the historic elements of advocacy and due process — oral argument. I for one challenge seriously that this is in the best interests of the administration of justice.

The legislative process has to take into account pertinent causes for proper result by remedial legislation. This is pertinently true as to the present work load of the Fifth Circuit and considerations of how it got that way before determining what to do about it.

The statistics show a constant, year by year progressive increase of the judicial appellate work load which directly derives, not from a Congressional expansion of appellate jurisdiction except as to criminal appeals, but from expansion of District Court jurisdiction coupled with a normal expansion of judicial business proximated by the normal population and business expansions of each state in the Circuit. The latter causes if they existed alone could hardly be causing the present judicial emergency. Elimination of three-judge court jurisdiction would effect a great saving of judicial time in the circuit courts. Restriction of class action jurisdiction would have a like beneficial effect.[1] A reversal of Congressional trend to expend

[1]See 28 U.S.C. §1407 and "Manual For Complex and Multidistrict Litigation" in conjunction with the March 15, 1972, "Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure" of the American College of Trial Lawyers.

progressively Federal judicial jurisdiction plainly would ameliorate greatly the progressively increasing judicial overload and diminish the asserted need for re-circuiting.

My analysis of Public Law 92-489, 92nd Congress, H.R. 7378, leads me to the conclusion that re-structuring and proliferating eleven judicial circuits is practically a foredrawn conclusion. I personally deplore any such intent because another alternative seems to me to be more practical and useful. I have studied the proposals made to the Commission so far as to the re-structuring of the Fifth Circuit is concerned and feel personally that none of these is usefully valid in meeting the problems of the future. Based solely on past and present statistics the Fifth Circuit is not today in actuality a collegial court as it should be, is more of an organization or rather a bureaucratic administrative organization which has a maximum number of judges and can no longer function effectively. These conclusions are apparently indisputable.

But none of the alternative proposals for dividing the circuit seems to take into account the statistical projection that in about a decade the states presently comprising the Fifth Circuit will be generating an aggregate of 30,000 appeals per annum. That, to me, means that in the less than ten years the Congress will be asked to re-circuit again. I personally am opposed to any geographical reorganization of the Fifth Circuit whatever. I have not heard nor seen any writing from anyone suggesting a plainly obvious alternative to drastic reorganization of the circuits but I cannot believe

that I could be the first or only one to think of and advance such an alternative.

This alternative is the creation of new Constitutional Article III Federal Courts each to be a United States Intermediate Court of Appeal and to be established in each state with a case load of appeals sufficient to justify respective courts of three, five or seven judges. These would *not* be mini-circuit courts. Smaller appellate volume states, such as Mississippi and Alabama combined as of today's needs, could have one such Court of Appeal for the two states combined which in the potential proliferation of judicial business therein could be split in future years. These Courts of Appeal would be layered in each circuit between the District Courts and the Circuit Court of Appeals in each circuit. General appellate and supervisory jurisdiction would be vested in the Intermediate Court of Appeal and the Circuit Courts of Appeals would become Courts of Writs and Errors with limited appellate jurisdiction. This should ameliorate the pressures on the Circuit Courts to an extent making their re-structuring unnecessary.

Such a system will be much more flexible in future years and probably no more expensive than proliferation of new circuits with all of the additional judges, facilities, personnel, etc., each of such shall need. With such a new appellate system I venture the estimate that in a few years the Fifth Circuit Court itself may find its burdens need fewer than fifteen active judges.

I understand that a couple of years ago the total cost of the entire Federal judicial system, from top to bottom and including all of its ancillary services and activities, aggregated only about $147,000,000.00 in a multi-billion dollar budget. The administration of his justice should be worth more than that to the American taxpayer, citizen and litigant, for the business, particularly the civil business, before the United States Courts belongs to him and not to the Federal Judges.

I am grateful for the Commission's courtesy and patience and thank you very much.

APPENDIX E

STATEMENT TO THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM BY SAMUEL C. GAINSBURGH, NEW ORLEANS

August 22, 1973

My name is Samuel C. Gainsburgh. My home is in New Orleans and I have been actively engaged in the private practice of law here since my admission to the Bar of the State of Louisiana in June of 1949. I was admitted to practice before the United States Court of Appeals for the Fifth Circuit on September 30, 1953, and to the Bar of the United States Supreme Court on February 9, 1955. I am a partner in the law firm of Kierr, Gainsburgh & Benjamin, an association of nine attorneys, five of whom are partners.

I am appearing before this Honorable Commission at the request of M. Truman Woodward, Jr., Esq., the current President of the Louisiana State Bar Association, but I wish it clearly understood that I do not represent that organization and that the views and observations I express are purely personal. It is my assumption that I was requested to appear by the Bar Association's president because of his knowledge that my personal practice has been predominantly in federal courts and, customarily, on behalf of plaintiffs in so-called "personal injury" matters, most often of a maritime or quasi-maritime nature. It is my hope that my selection to appear was also predicated upon Mr. Woodward's assumption that I harbor a keen interest in those matters having to do with the fair ad-

ministration of justice for all types and classes of litigants.

Needless to say, I was flattered by Mr. Woodward's request and I am, indeed, honored by your allowing me to testify on this most important subject.

It is my understanding of the function and purpose of this Commission that it desires to consider and make recommendations for changes, if indicated, in the present geographical boundaries of the several federal judicial circuits and, secondly, that the Commission desires input on the structure and internal procedures of the various Courts of Appeal in order to determine what, if any, changes therein are to be recommended for improvements designed to expedite and effectuate disposition of appeals, consistent with fundamental concepts of fairness and due process of law.

Initially, I would wish to emphasize that my experience and knowledge, if any, with judicial circuits is limited exclusively to the Fifth Circuit. I can readily appreciate that recommendations concerning alteration of the present geographical boundaries of this Circuit may, if not will, have an effect on the boundaries of the presently contiguous circuits, if not many of the others throughout the continental United States.

However, in view of my conception of the true purpose of the various Courts of Appeal and in view of my belief that the Court of Appeals for the Fifth Circuit has, with its boundaries virtually unchanged since 1891, distinguished itself so well professionally and pro-

cedurally, I must state flatly and categorically that I do not believe that any geographical alteration or combinations of geographical alterations of present Fifth Circuit boundaries or component states is either necessary or desirable.

Possessing, as it now does, the historically and culturally divergent components from west Texas to north Georgia, Alabama and Mississippi to the southern tip of Florida, it would be, in my humble judgment, difficult to conceive of a geographic area better representative of, or potentially better suited to the performance of, a heterogeneous regional unit from which to draw judges who, for all practical purposes, serve as the court of last resort for a substantial portion of the people of this great nation. (As an aside, during the course of many years of travel in connection with national bar association activities, I am constantly made aware of the esteem in which lawyers throughout this land hold the decisions emanating from our Fifth Circuit Court of Appeals.) On the subject of splitting the Circuit, or spinning off some of its component states into other circuits, I can only reiterate my personal opposition to any such suggestions.

With respect to the "structure" and "internal procedures" in the Fifth Circuit, as one lawyer reasonably well acquainted with these subjects, there are, indeed, some serious problems that virtually cry out for solution. In short, with its present complement of judges and "structure," the Fifth Circuit has, and for the foreseeable future will continue to have, a killer caseload.

From the reports and from the statistics that are available and, I am sure, have carefully been studied by this Honorable Commission, it is perfectly obvious that, but for the innovativeness and dedication of the present judges, the Court would have drowned in a sea of litigants' unreachable appeals. "Screening" and severe curtailment of oral argument have been the lifesaving measures devised and implemented just to permit the survival of the Court as a functioning institution, dealing in the business of judging.

But, like most other things, while screening and summary dispositions have their advantages, I submit to this honorable body that they also have some very grave and fundamental disadvantages — so grave that other means *must* be found and implemented so that the quality of justice is not "screened" out in order that the quantity of justice can be increased.

Without desiring to pontificate, I take the liberty of suggesting that one of the most fundamental and important functions of government ough to be to insure that the supply of high quality judging is at least equal to the demand for justice by those whose need is to be judged. Closing the courthouse door is, I respectfully submit, not a proper answer to overworked judges or overcrowded court calendars. The civilized solutions to those problems are more judges and more courtrooms.

Screening and curtailment of oral argument are, hopefully, only temporary stop-gap measures. They do not, I submit, comply with the admonition that it is

not only important that justice be done, but also that justice *appear* to have been done. Moreover, the procedure of "screening," as I understand its meaning in this circuit, lacks elements of *quality* in the business of judging that long have been regarded as important, if not essential, to appellate review: these are "oral argument" and face-to-face conferences between the "deciding" judges. There is no reason to doubt that *more* cases can be decided if *no* time is devoted to oral argument in what your figures will demonstrate is now approaching *sixty* percent of all cases considered in the Court of Appeals. There is little reason to doubt that *more* cases can be decided if there is *no* time taken for face-to-face discussion among the deciding judges. But, I submit to you that the question that we *should* ask ourselves is whether or not, under this screening procedure, more cases can be decided *correctly and justly*.

You have, as I have said, been virtually inundated with tables and figures and statistics; and I do not wish to add unnecessarily to that already formidable array of information.

But, I believe that I can at least cast substantial doubt on whether the *quality* of justice, since "screening," is as good as it was before this lifesaving measure was instituted in our Circuit.

Most lawyers, never having been judges, may well not be able to appreciate the true problems inherent in the business of judging. But, the reverse is not true, overlooking the rapidity with which some lawyers

think some judges have forgotten they were ever lawyers.

For those judges whose memories have waned and for those of you who are not members of the legal profession, may I presume to advance the suggestion that, to the lawyer whose case is on appeal, as well as to his client, it is of utmost importance that he *know* his client's position will be given full and fair consideration.

Trial courts, it has been said, search for truth; appellate courts search for error. Error, for all practical purposes, means that the trial court's judgment will not be affirmed. It will be reversed or at least modified. These are my statistics bearing, I feel, on the question of whether the Court's search for error is as diligent with screening as it was before this practice was instituted:

Year (FY]	No. of Judges	No. of Cases Judged	% Reversed
1963-64	7	828	29.5
1964-65	7	716	25.1
1965-66	9	886	24.7
1966-67	12	970	25.3
1967-68	13	1089	25.5
1968-69*	12	1279	24.8
1969-70**	15	1427	24.1
1970-71	15	1812	19.5
1971-72	15	2025	14.9
1972-73	15	2167	15.6

*Six months of "Screening"

**First Full Year of "Screening"

I believe that your tables and charts will reveal that there has been no major change in the subject matter of the appeals during the period covered by my table of statistics.

From the Court's statistics, you know that, as of the immediate past fiscal year, *fifty-seven percent* of *all* of the appellants did *not* get a hearing of *any* kind, insofar as oral argument goes. Of that percentage, thirty-three percent do not even know *why* their appeals failed because they received "Rule 21" treatment and not even a *per curiam* opinion.

But more significantly, as my table reflects, the *average* number of successful appeals for the two years *before* screening began was slightly more than one out of *four;* whereas, for the last two years, with screening now in full swing, the appellants' *average* rate of success was down to about one out of *six*. For the sake of convenience, if we use twenty-five percent for the pre-screening years mentioned and fifteen percent for the two current screening years, the plain mathematical result is that our judges are able to discern forty percent *less* error when they look at appeals through a screen than when they were examining them in the cold light of oral argument and post-argument face-to-face conferences.

Let me hasten to say that the foregoing is not to be construed as criticism of the judges or anyone of them. I have, I dearly hope, already said and re-said that, in view of the present complement and structure of the Court, screening was necessary — it was, in-

deed, lifesaving. But I think that the figures that I have been presumptuous enough to offer at least support the inference, if they do not compel it, that when any human being, even a United States Circuit Judge, is required to do more than is humanly possible he cannot do the same quality of work that he would do if he were only asked to work within his human limitations. Fifty percent justice is still, however, fifty percent injustice.

What, then, may offer some assistance to this Commission in restoring to our Fifth Circuit the highest quality of justice that man is capable of dispensing?

I am aware that there is a firm and, perhaps, well founded opposition to increasing the number of judges of the Court. It will be, if it has not already been, suggested that there is something ideal about the number "nine" for appellate court optimum performance. Never having been a judge, I certainly cannot argue that point, except to say that for more than seven years now the Court has been functioning with a *greater* complement of judges.

As an outsider, however, it seems quite clear to me that the Court's caseload rather naturally divides itself into two major categories of cases, namely, criminal and civil. As an inquisitive outsider, I have reason to believe that the Office of the Clerk is presently already somewhat departmentalized along these same lines.

My effort, then, at making a constructive suggestion to this honorable body is to pose this question: Why not create, within the present parameters of the Circuit (and, perhaps, any other Circuit having similar problems to those of the Fifth) a United States Court of Criminal Appeals for the Fifth Circuit? Let it have its own complement of Article III Circuit Judges chosen, hopefully, for their expertise in the field of criminal law, with a staff of *career* para-judicial personnel adequate to maximize the time devoted by all of the judges to their business of judging, including resolving their intra-circuit conflicts with their own *en banc* procedures, within the two divisions of the Court. In summary, I suggest consideration be given to dividing the Court, rather than the circuit, and that the division be made along lines that seem, to me anyway, both natural and logical — along lines of subject matter rather than of geography.

In conclusion, may I express my appreciation again for the opportunity of participating in these proceedings.